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Testamentary Gifts Resulting From Meretricious Relationships: Undue Influence or Natural Beneficence?

*Joseph W. deFuria, Jr.**

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I. Introduction

In this country, the freedom of testamentary disposition is one of the basic tenets of our social structure. Even though the ability to dispose of one's property by will is not a federally protected right,¹ the privilege of testation is commonly considered a "right" fundamental to our form of government. In fact, restrictions on the freedom of testation are usually considered anathema both to private property rights and to the rights of the individual. In view of this sentiment, the intent of the testator has naturally played a dominant role in giving effect to his last wishes.

Nevertheless, despite judicial assertions to the contrary,² the testator is not always permitted to dispose of his property as he sees fit. The freedom of testation has always been tempered by notions of fairness, justice, and especially morality.³ Since one needs to fulfill rather minimal

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1 As Justice Jackson pointed out in *Irving Trust Co. v. Day*, 314 U.S. 556 (1942):

Rights of succession to the property of a deceased . . . are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.

Id. at 562. On a state level, only Wisconsin recognizes a constitutional right of inheritance. See *Nunnemacher v. State*, 1129 Wis. 190, 108 N.W. 627 (1906).

2 "The right of testamentary disposition of one's property as an incident of ownership, is by law made absolute. It is a valuable right, closely protected by statute and judicial opinion." *In re Mar-tison's Estate*, 29 Wash. 2d 912, 913, 190 P.2d 96, 97 (1948).

3 See Every, *Undue Influence—Judicial Implementation of Social Policy*, 1968 WIS. L. REV. 569, 569.

mental competency requirements in order to make a will,⁴ courts frequently employ a variety of legal tools to protect the testator both from the malevolent actions of others as well as from his own folly.⁵ The doctrine of undue influence, in particular, is intended to serve as a protective device to ensure that the wishes and choices of the testator are truly his own and not those of some other person.⁶ But, because it is often impossible for judges or juries to decide cases in a moral vacuum, the doctrine often functions instead as a barometer of society's mores.⁷

Nowhere is this tendency more prevalent than in those cases where the testator has given a significant portion of his estate to a person with whom he has had a meretricious relationship.⁸ Although not always determinative, proof of a meretricious relationship is generally considered quite relevant, at the very least, to the question of whether the testator has been unduly influenced into making the gift.⁹ In fact, when coupled with a disposition which is considered unjust in light of those who are usually deemed to be the natural objects of the testator's bounty, the relationship often raises an inference of undue influence which the jury may properly consider in deciding the case.¹⁰ This is true even though the testator definitely intended the disposition in question, and even though there is really no indication that his testamentary wishes have been compromised.

In the past, this view has been problematic from the perspective of freedom of testation. On the one hand, the testator, for the most part, has the privilege of selecting the beneficiaries of his estate. On the other hand, society has an interest in ensuring that the testator is, in fact, mak-

4 It is a basic truism of estate law that one needs less mental capacity to execute a will than a contract. This is reflected by the vague standard, "of sound mind," which many jurisdictions use to describe the mental competence required to make a will. See, e.g., ARIZ. REV. STAT. ANN. § 14-2501 (1975); DEL. CODE ANN. tit. 12, § 201 (1974); 20 PA. CONS. STAT. § 2502 (1976).

5 For example, the doctrine of dependent relative revocation, which often allows a second will to stand despite its revocation, sometimes protects the testator from his own mistakes. Also, the remedy of the constructive trust, by preventing unjust enrichment, often corrects the result of improper actions by others towards the testator.

6 See, e.g., *In re Estate of Larendon*, 216 Cal. App. 2d 14, 30 Cal. Rptr. 697 (1963) (testator's will held product of undue influence due to virtual duress).

7 See, e.g., *Holland v. Traylor*, 227 So. 2d 829 (Miss. 1969) (meretricious relationship between older woman and younger man held to unduly influence woman into making him a principal beneficiary under her will); *In re Kaufmann's Will*, 20 App. Div. 2d 464, 247 N.Y.S.2d 664 (1964), *aff'd*, 15 N.Y.2d 825, 257 N.Y.S.2d 941, 205 N.E.2d 864 (1965) (homosexual relationship between two men held to unduly influence one to will his estate to the other).

According to one study done some years ago, not only do juries find for the contestant in over 75% of will contests submitted to them, but trial judges rarely withdraw cases from their consideration, or interfere with jury verdicts. See Comment, *Will Contests on Trial*, 6 STAN. L. REV. 91 (1953). See also Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958).

8 Although "meretricious" originally connoted purely illicit and tawdry sexual behavior ("characteristic of a prostitute"), the term, in legal parlance, refers to any unlawful sexual relationship. See WEBSTER'S DICTIONARY 1127 (2d ed. 1980); BLACK'S LAW DICTIONARY 891 (5th ed. 1979). Within the context of this article, however, the term "meretricious relationship" is used to signify a voluntary, sustained sexual relationship between two persons which is not sanctified by lawful marriage. It thus encompasses the sexual relationship between two unmarried cohabitants of the opposite or same sex, as well as the term "meretricious spouse."

9 See *infra* notes 13-42 and accompanying text.

10 In a few jurisdictions, evidence of a meretricious disposition in light of the testator's familial situation has even raised a presumption of undue influence. See, e.g., *Snyder v. Erwin*, 229 Pa. 644, 79 A. 124 (1911).

ing a free choice. But, in light of the change in attitude towards meretricious relationships which has taken place in our society over the last twenty years,¹¹ the role which a meretricious relationship can play in determining undue influence in testamentary dispositions is both unrealistic and out of date. For instance, the number of "live-in" relationships which exist in our society today hardly raises an eyebrow.¹² In fact, in light of the current mores of society, it makes far more sense to view testamentary gifts based upon meretricious relationships as evidence of the natural beneficence of the testator, rather than as evidence of undue influence. It is perfectly reasonable that a testator would want to benefit a person who had given him some measure of comfort, support, or happiness during his life, at the expense of family members who either had ignored or acted badly towards him.

This Article argues that, where a testator has willed a significant portion of his property to someone with whom he has had a meretricious relationship, the fact of the relationship, far from automatically serving as some basis for a finding of undue influence, should instead be able to serve equally well, at the very least, as proof that the beneficiary was indeed a natural object of the testator's bounty. The Article begins by investigating the attitude of courts regarding testamentary dispositions resulting from meretricious relationships. It then examines recent developments in the area of domestic relations law in order to place the traditional view in a more modern, and perhaps proper, perspective. The Article next analogizes this perspective to established norms and emerging trends in the areas of life insurance, entitlement, and tort law. Finally, a more realistic perception of testamentary gifts based upon meretricious relationships is articulated that, when compared to the law of other countries, solves the inherent conflict between freedom of testation and the doctrine of undue influence that inevitably arises whenever "meretricious dispositions" are associated with influences that are considered undue.

II. The Traditional View: Considerations of Undue Influence

The doctrine of undue influence traditionally played an important role in those cases where there is evidence of a meretricious relationship which preceded a testamentary gift to the surviving partner. This can perhaps be explained, in part, by the original connotation of the word "meretricious," which suggested less than scrupulous behavior.¹³ "Undue" influence was naturally associated with unsavory conduct.¹⁴

11 Recently, an Episcopalian bishop even went so far as to indicate that sex outside of marriage should be condoned under certain circumstances. See Ostling, *Bishop Spong on Right and Wrong*, TIME, June 13, 1988, at 56.

12 Based upon 1986 census figures, over 2.2 million couples of the opposite sex cohabited without marriage in the United States. See U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, No. 412, HOUSEHOLDS, FAMILIES, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1986 (ADVANCE REPORT) 2, fig. 2.

13 See WEBSTER'S DICTIONARY 1127 (2d ed. 1980).

14 Not so long ago, even a marriage between an elderly man and a young woman generated suspicion. See *In re Van Ness' Will*, 78 Misc. 592, 606, 139 N.Y.S. 485, 498 (1912).

Most courts reflected this viewpoint by emphasizing that, although not determinative,¹⁵ a meretricious relationship was entitled to some weight in determining the sufficiency of the evidence presented to show undue influence.¹⁶ A few courts even went so far as to specify that a rebuttable presumption of undue influence arose whenever the testator willed his estate to a meretricious partner rather than to the natural objects of his bounty.¹⁷ Many more courts emphasized that such a relationship raised a significant suspicion of undue influence, which would be closely scrutinized.¹⁸ In other words, the relationship was an important factor to be considered by the jury, for this factor might well color other

15 Because judges were inevitably influenced by their own views on morality, many courts, even within the same jurisdiction, used somewhat different standards in determining the weight to be given evidence of an "illicit" relationship. *Compare* Central Trust Co. v. Boyer, 308 Pa. 402, 410, 162 A. 806, 809 (1932) with Allshouse v. Kelly, 219 Pa. 652, 654, 69 A. 88, 88 (1908).

If undue influence is found to exist at the time of the execution of the will, most courts will strike those portions of the will which are the products of the influence, as long as the remaining provisions can still effectuate the intent and testamentary scheme of the testator. *See* Williams v. Crickman, 81 Ill. 2d 105, 115, 405 N.E.2d 799, 803-04 (1980). Some courts, however, follow a minority position, which invalidates the entire will if any portion of it is held to be the product of undue influence. *See, e.g.,* McCarthy v. Fidelity Nat'l Bank & Trust Co., 325 Mo. 727, 735, 30 S.W.2d 19, 21 (1930).

16 *See, e.g.,* Griffith v. Benzinger, 144 Md. 575, 588, 125 A. 512, 517 (1924).

17 For instance, in *Lamborn v. Kirkpatrick*, 97 Colo. 421, 50 P.2d 542 (1935), the testator unlawfully cohabited with the principal beneficiary under his will. The Supreme Court of Colorado upheld an instruction by the trial judge that such a relationship raised a presumption of undue influence:

The . . . intimacy of [the] meretricious relationship between a testator and a beneficiary who is not related to him by blood or marriage usually assumes a clandestine form and, after the testator's death, would almost invariably render such undue influence as results therefrom incapable of proof except by the aid of the presumption which the instruction in question undertakes to recognize.

Id. at 426, 50 P.2d at 544. *See also* Snyder v. Erwin, 229 Pa. 644, 647, 79 A. 124, 125 (1911).

This kind of presumption would normally be reserved for situations involving *inter vivos* transfers between meretricious partners, since the living are presumptively in greater need of protection from their own actions than the dead. *See* Beatty v. Strickland, 136 Fla. 330, 334-35, 186 So. 542, 544 (1939); Leighton v. Orr, 44 Iowa 679, 689 (1876); Platt v. Elias, 186 N.Y. 376, 378-79, 79 N.E. 1, 2 (1906). *See also* Sellers v. Qualls, 206 Md. 58, 71-73, 110 A.2d 73, 80 (1954). *But see* Price v. Reilly, 135 N.J. Eq. 555, 559, 39 A.2d 426, 428 (N.J. Ch. 1944), *aff'd*, 136 N.J. Eq. 400, 42 A.2d 271 (1945) (immoral relationship between parties not sufficient in itself to raise a presumption that a conveyance was procured by undue influence).

In addition, such a presumption frequently arises in testamentary as well as *inter vivos* transactions whenever the donor makes a substantial gift to someone with whom he has stood in a confidential relationship. *See, e.g.,* Burns v. Lucich, 6 Ark. App. 37, 47, 638 S.W.2d 263, 269 (1982) (*inter vivos*); Schmidt v. Schwar, 98 Ill. App. 3d 336, 342, 424 N.E.2d 401, 405 (1981) (testamentary); Cadorette v. Cadorette, 147 Me. 79, 85-86, 83 A.2d 315, 318 (1951) (*inter vivos*); Meley v. DeCoursey, 204 Md. 648, 655, 106 A.2d 65, 68 (1954) (*inter vivos*); Hodges v. Hodges, 692 S.W.2d 361, 367 (Mo. App. 1985) (*inter vivos*); Haynes v. First Nat'l State Bank of N.J., 87 N.J. 163, 177, 432 A.2d 890, 897-98 (1981) (testamentary); and *In re Faulks' Will*, 246 Wis. 319, 360, 17 N.W.2d 423, 440 (1945) (testamentary). Some courts, however, merely shift the burden of going forward with the evidence onto the proponent. *See, e.g.,* *In re Estate of Carpenter*, 253 So. 2d 697, 703-04 (Fla. 1971); *In re Reddaway*, 214 Or. 410, 420, 329 P.2d 886, 890-91 (1958). Although confidential relationships, which usually include an element of unequal bargaining power between the parties, can, of course, include familial and intimate relationships, this article does not bring to issue meretricious relationships which are also confidential, since treatment of such relationships would be subsumed under the law regarding confidential relationships. *See, e.g.,* *In re Moses*, 227 So. 2d 829 (Miss. 1969) (illicit relationship between testatrix and attorney-beneficiary held to result in undue influence, despite testatrix's consultation with independent counsel).

18 *See, e.g.,* Arnault v. Arnault, 52 N.J. Eq. 801, 805, 31 A. 606, 608 (1895).

circumstances with a significance they might not otherwise have had.¹⁹ The majority of courts in most jurisdictions, however, viewed evidence of a meretricious relationship as a relevant fact to be considered in connection with any other fact or circumstance relative to the issue of whether a will was procured by undue influence.²⁰

But squaring this generally adverse judicial attitude toward meretricious relationships with the customary definition of undue influence is inherently problematic since the doctrine, in theory at least, normally does not include an element of morality on the part of the testator. Instead, most definitions of undue influence usually focus on its coercive element. For example, the influence must "destroy the testator's free agency and substitute for his own another person's will,"²¹ or "subjugate the mind of [the] testator to the wishes of the person exerting the influence"²² at the time the will is made. Thus, undue influence must "oblige [the testator] to make a disposition of his property which he would not have made if left freely to act according to his own wishes and pleasures."²³ As one court eloquently put it:

[U]ndue influence . . . mean[s] whatever destroys free agency and constrains the person whose act is under review to do that which is contrary to his own untrammelled desire. It may be caused by physical force, by duress, by threats, or by importunity. It may arise from persistent and unrelaxing efforts in the establishment or maintenance of conditions intolerable to the particular individual. It may result from a more subtle conduct designed to create an irresistible ascendancy by imperceptible means. It may be exerted either by deceptive devices or by material compulsion without actual fraud. Any species of coercion, whether physical, mental, or moral, which subverts the sound judgment and genuine desire of the individual, is enough to constitute undue influence. Its extent and degree is inconsequential so long as it is sufficient to substitute the dominating purpose of another for the free expression of the wishes of the person signing the instrument.²⁴

19 *Hyatt v. Wroten*, 184 Ark. 847, 852, 43 S.W.2d 726, 728 (1931); *Alford v. Johnson*, 103 Ark. 236, 244, 146 S.W. 516, 420 (1912). See *Glider v. Melinski*, 238 Iowa 140, 147, 25 N.W.2d 379, 382 (1947).

20 See *Locke v. Sparks*, 263 Ala. 137, 140, 81 So. 2d 670, 673 (1955); *Norton v. Clark*, 253 Ill. 557, 570, 97 N.E. 1079, 1084 (1912); *Porschett v. Porschett*, 82 Ky. 93, 98 (1884); *In re Diliros' Will*, 156 Me. 508, 539, 167 A.2d 571, 587 (1960); *Griffith v. Benzinger*, 144 Md. 575, 588-89, 125 A. 512, 517 (1924); *Saxton v. Krumm*, 107 Md. 393, 401, 68 A. 1056, 1058 (1908); *Neill v. Brackett*, 234 Mass. 367, 369, 126 N.E. 93, 94 (1920); *In re Anna's Estate*, 248 N.Y. 421, 162 N.E. 473 (1928); *In re Wertheimer's Estate*, 286 Pa. 155, 165, 133 A. 144, 148 (1926); *Holmes v. Houston*, 241 S.W. 1039, 1046 (Tex. Civ. App. 1922). See also *In re Estate of Burkland*, 8 Wash. App. 153, 158-59, 504 P.2d 1143, 1146 (1972).

Most of these viewpoints play a role in the famous case of *In re Kaufmann*, 20 A.D. 464, 247 N.Y.S.2d 664 (1964), *aff'd*, 15 N.Y. 825, 257 N.Y.S.2d 941, 205 N.E.2d 864 (1965), in which a wealthy and allegedly homosexual testator named his lover as the principal beneficiary under his will. Two different juries found that the will had been procured by undue influence. The Supreme Court, Appellate Division, held that the evidence sustained a finding of undue influence, exercised over a period of several years, despite the fact that the testator had clearly expressed his last wishes and his reasons therefor in a letter to his family. However, the court reached its result, in part, by determining that the relationship between the two men was a confidential as well as meretricious one. *Id.* at 486, 247 N.Y.S.2d at 685.

21 *In re Arnold's Estate*, 16 Cal. 2d 573, 575, 107 P.2d 25, 27 (1940).

22 *Lindinger v. Lindinger*, 126 Ind. App. 463, 466, 130 N.E.2d 75, 77 (1955).

23 *Id.*

24 *Neill v. Brackett*, 234 Mass. 367, 369, 126 N.E. 93, 94 (1920).

Such all-embracing definitions allowed most courts to pay lip service to the technically accurate assertion that testamentary gifts resulting from meretricious relationships did not automatically result in a finding of undue influence. In fact, courts often oversimplified the matter, by making sweeping pronouncements about the ability of a testator to dispose of his property to whomever he pleased, regardless of the relationships involved.²⁵ Thus, according to many courts, undue influence did not result from "the promptings of affection,"²⁶ "the desire of gratifying the wishes of another,"²⁷ or from "the memory of kind acts and friendly offices,"²⁸ but from "a coercion produced by importunity, or by a silent resistless power which the strong will often exercises over the weak . . . which [can] not be resisted, so that the motive [of the testator is] tantamount to force or fear."²⁹ "[T]here must be more than mere influence or persuasion because a person can be influenced to perform an act that is nevertheless his voluntary action."³⁰ These courts, in line with most commentators, even postulated that, in theory, a testator could favor his mistress over his wife or family,³¹ and that the unjustness of a will should not enter into a determination of its validity.³² Mere persuasion, earnest solicitation, or well-deserved influence over another were therefore insufficient to affect the validity of a will.³³ All of this would seem to indicate that undue influence would not be a factor whenever natural affection or the desire to please the wishes of a beloved were the principal motivations behind a testamentary gift.

In the application of these theoretical principles, however, courts often ignored their own proclamations about the inherent nature of undue influence. For instance, one early opinion emphasized:

Lawful influence, such as that arising from legitimate family and social relations, must be allowed to produce its natural results, even in influencing last wills. However great the influence thus generated may be, it has no taint of unlawfulness in it; and there can be no presumption of its actual unlawful exercise merely from the facts that it is known to have existed, and that it has manifestly operated on the testator's mind as a reason for his testamentary dispositions. . . . But we should do violence to the morality of the law, and therefore to the law itself, if we should apply this rule to unlawful . . . relations[.] . . . [W]here apparently used to obtain selfish advantages, they are regarded with deep

25 See *Mangan v. Mangan*, 554 S.W.2d 418, 421 (Mo. App. 1977).

26 *In re Burke*, 82 A.D.2d 260, 269, 441 N.Y.S.2d 542, 548 (1981) (quoting *In re Walter*, 6 N.Y.2d 49, 53-54, 188 N.Y.S. 168, 159 N.E.2d 665 (1959)).

27 *Id.*

28 *Id.*

29 *Id.*

30 *In re Will of Coley*, 53 N.C. App. 318, 320, 280 S.E.2d 770, 772 (1981).

31 See *Reed v. Shipp*, 293 Ala. 632, 639, 308 So. 2d 705, 710 (1975); T. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 55, at 258 (2d ed. 1953). See also D. PARRY, *THE LAW OF SUCCESSION* 10-11 (5th ed. 1966).

32 *In re McCauley*, 101 Ariz. 8, 16, 415 P.2d 431, 439 (1966); *Abel v. Dickinson*, 250 Ark. 648, 652, 467 S.W.2d 154, 155 (1971); *In re Dobson's Will*, 258 Wis. 587, 588-89, 46 N.W.2d 758, 759-60 (1951).

33 See *McClure v. Kerchner*, 107 Okla. 28, 33, 229 P. 589, 594 (1924).

suspicion; and it would be strange if unlawful relations should be more favourably regarded.³⁴

Other courts also followed this line of reasoning by indicating that undue influence was more readily inferred in the case of a will made in favor of a mistress than a wife.³⁵ Furthermore, a seemingly unfair, unjust, or unnatural disposition was indeed a relevant consideration in determining whether improper influence had been used.³⁶ In fact, a wide range of evidence would be considered in order to ascertain whether a will was procured by undue influence,³⁷ since:

It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty.³⁸

A major reason for the apparent disparity between the theoretical underpinnings of the doctrine of undue influence and its practical application to testamentary dispositions involving meretricious relationships is that most courts tend to focus on whether the alleged influence by the beneficiary is deemed undue, instead of concentrating on whether the testator has in fact been coerced into making the gift. Since the relationship which arises between meretricious partners is deemed to provide favorable opportunities for the exertion of undue influence, proof of the relationship becomes relevant in such cases.³⁹ Thus, whether the meretricious relationship is given weight in the determination of undue influence depends more on the attitude of the court towards the conduct in question than on the application of generalized principles. And, because most courts place more importance on the effect or result of the influence than on its actual cause, application of the doctrine often ignores the basic element of coercion in undue influence. One court typified this tendency well:

Rather than approach the problem from the standpoint of the testator's freedom of will, it would be more profitable to focus the emphasis on the nature of the influencer's conduct in persuading the testator to act as he does. The question is, has the influencer by his conduct gained an unfair advantage by devices which reasonable men regard as

34 *Dean v. Negley*, 41 Pa. 312, 317 (1862).

35 *See Smith v. Henline*, 174 Ill. 184, 196-97, 51 N.E. 227, 231 (1898); *Kessinger v. Kessinger*, 37 Ind. 341, 343 (1873); *In re Davis' Will*, 172 Or. 354, 370-71, 142 P.2d 143, 149 (1943). *See also* 3 W. PAGE, WILLS § 29.88, at 612-13 (Bowe-Parker rev. 1961).

36 *See Newman v. Smith*, 77 Fla. 633, 666, 82 So. 236, 246 (1919); *In re Reddaway's Estate*, 214 Or. 410, 426, 329 P.2d 886, 892 (1958).

37 *See Carpenter v. Horace Mann Life Ins. Co.*, 21 Ark. App. 112, 122, 730 S.W.2d 502, 507 (1980).

38 *In re Will of Coley*, 53 N.C. App. 318, 321, 280 S.E.2d 770, 772 (1981).

Those circumstances often considered important to a determination of undue influence include whether the beneficiary participated in the preparation of the will, whether the decedent's attitude towards the natural objects of his bounty underwent a sudden change, and whether the gift is deemed to be unjust or unnatural. *See In re Reddaway's Estate*, 214 Or. 410, 416-17, 329 P.2d 886, 891-92 (1958).

39 *See In re Kelly's Estate*, 150 Or. 598, 618, 46 P.2d 84, 92 (1935).

improper? . . . "The nature of the influence can be judged only by its result. It is the end accomplished which colors the influence exerted We are to understand the word 'undue' as describing not the nature . . . of the influence existing, . . . but as qualifying the purpose with which it is exercised or the result which it accomplishes" . . . [T]he emphasis should be on the unfairness of the advantage which is reaped as the result of [the] conduct.⁴⁰

Many courts, and some commentators, have attempted to explain away this tension between theory and practical application by suggesting that undue influence is closer to fraud than to duress.⁴¹ But this resolution conflicts with the usual definitions of undue influence, and allows morality to play a large, and often inappropriate, role in determining undue influence. Thus, a certain amount of inattention to the basic thrust of the doctrine has prevented most courts from analyzing proof of meretricious relationships connected with testamentary dispositions in any way but a negative one. Indeed, very few courts have dealt with the problem from the more appropriate perspective of, and with an emphasis on, the freedom of testation. As one court accurately explained:

A testator's favor expressed in a will may be won by devoted attachment, self-sacrificing kindness, and the beneficent ministrations of friendship and love. These influences are not undue. We expect partiality to attend them. They bring preferment as their natural reward, and they do not become unrighteous, although they establish a general ascendancy over the testator leading him to find comfort and pleasure in gratifying the wishes and desires of the person exercising them. Other less worthy influences may make equally strong appeals and may result in the same general dominion and still be sufferable in contemplation of the law. Influences to induce testamentary disposition may be specific and direct without becoming undue. It is not improper to advise, to persuade, to solicit, to importune, to entreat, and to implore. Hopes and fears and even prejudices may be moved. Appeals may be made to vanity and to pride; to the sense of justice and to the obligations of duty; to ties of friendship, of affection, and of kindred; to the sentiment of gratitude; to pity for distress and destitution. It is not enough that the testator's convictions be brought into harmony with that of another by such means. His views may be radically changed, but so long as he is not overborne and rendered incapable of acting finally upon his own motives, so long as he remains a free agent, his choice of a course is his own choice, and the will is his will and not that of another.⁴²

40 *In re Reddaway's Estate*, 214 Or. 410, 420, 329 P.2d 886, 890 (1958) (en banc) (citing *Morris v. Morris*, 192 Miss. 518, 521, 6 So. 2d 311, 312 (1942)). See also *In re Sessions*, 217 Or. 45, 51, 341 P.2d 512, 517 (1959).

41 See, e.g., *In re Reddaway's Estate*, 214 Or. 410, 420, 329 P.2d 886, 890 (1958) (en banc); Perr, *Wills, Testamentary Capacity and Undue Influence*, 9 BULL. AM. ACAD. PSYCHIATRY & LAW, 15, 16 (Mar. 1981).

42 *Ginter v. Ginter*, 79 Kan. 721, 726, 101 P. 634, 636 (1909):

It should be noted that not all courts followed the traditional approach to meretricious gifts. Several select opinions have observed that it is difficult to base a finding of undue influence on the testator's natural affection for someone with whom he has had an intimate relationship. See, e.g., *Parrisella v. Fotopulos*, 111 Ariz. 4, 522 P.2d 1081 (1974); *In re Ruffino's Estate*, 116 Cal. 304, 316, 48 P. 127, 130 (1897); *Monroe v. Barclay*, 17 Ohio St. 302, 317 (1867); *In re Estate of Newkirk*, 456 P.2d 104, 108 (Okla. 1969); *Estate of Quenville*, 220 Or. 159, 183, 347 P.2d 609, 619 (1959); *Wainwright's Appeal*, 89 Pa. 220, 226 (1879); *In re Lavelle's Estate*, 122 Utah 253, 265, 248 P.2d 372, 376

III. The Traditional View Outdated: The Changing Attitude Towards Meretricious Relationships

It is difficult to dispute that the law's perception of immorality has narrowed considerably over the past two decades.⁴³ Dramatic changes have occurred in the law's general treatment of domestic relations matters, particularly in the constitutional, criminal, and family law areas. An examination of such changes indicates that it is no longer appropriate to view testamentary gifts resulting from meretricious relationships as evidence of undue influence.

For example, in 1972, the United States Supreme Court held that the unmarried as well as the married have a right of access to contraceptives.⁴⁴ A year later, the Court decided that women have a constitutional right to abortion during certain stages of pregnancy.⁴⁵ About the same time, many states began to repeal criminal statutes for conduct previously considered immoral or illicit. Thus, in several jurisdictions, adultery and fornication are no longer considered crimes.⁴⁶ In addition, numerous legislatures have recently enacted "no fault" divorce statutes.⁴⁷ Society's notion of what is "proper" or "moral" also changed a great deal over the last few years. For instance, it is now routine to see advertisements for feminine hygiene products, jock itch, and condoms on national television—subjects previously considered unmentionable in polite conversation.

The change in attitude is perhaps most striking when it comes to cohabitation between unmarried partners, probably the most visible form of meretricious relationship. The number of couples who cohabit without marrying has increased rapidly over the last twenty years. The latest census figures show that there are now well over two million un-

(1952); *In re Estate of Burns*, 23 Wis. 2d 175, 127 N.W.2d 239 (1964). See also *In re Estate of Lan-
glois*, 361 Mich. 646, 106 N.W.2d 132 (1960); *In re Swartz's Will*, 79 Okla. 191, 194, 192 P. 203, 206
(1920).

43 See Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1817 (1985).

44 Eisenstadt v. Baird, 405 U.S. 438 (1972), which was based in part upon *Griswold v. Connecti-
cut*, 381 U.S. 479 (1965) (constitutional "zone of privacy" recognized). See also Karst, *The Freedom of
Intimate Association*, 89 YALE L.J. 624 (1980).

45 Roe v. Wade, 410 U.S. 113, 163-64 (1973) (states must refrain from regulating abortion dur-
ing the first trimester of pregnancy, and have only limited regulatory powers during the second
trimester).

46 See, e.g., CAL. PENAL CODE §§ 269a-269b (West 1970) (cohabitation and adultery) (repealed
1975); IND. CODE ANN. § 35 1-82-2 (Burns 1905) (adultery and fornication) (repealed 1976); IOWA
CODE § 702 (1975) (adultery and fornication) (repealed 1976); KY. REV. STAT. ANN. § 436.070
(Michie/Bobbs-Merrill 1942) (fornication) (repealed 1975); ME. REV. STAT. ANN. tit. 17, § 1551
(1954) (fornication) (repealed 1975); N.H. REV. STAT. ANN. § 632:2 (1974) (deviate sexual relations)
(repealed 1975); N.J. STAT. ANN. § 2a:110-1 (West 1969) (fornication) (repealed 1978); OR. REV.
STAT. §§ 167.005, .015 (adultery, lewd cohabitation) (repealed 1971). See also *State v. Pilcher*, 242
N.W.2d 348 (Iowa 1976) (statute outlawing sodomy unconstitutional as applied to consensual acts of
adult persons of the opposite sex not married to each other). But see ILL. ANN. STAT. ch 38, para. 11-
8 (Smith-Hurd 1979); WIS. STAT. ANN. § 944.15 (West 1982).

47 See, e.g., ARIZ. REV. STAT. ANN. § 25-312 (1976); CAL. CIV. CODE § 4506 (West 1983); DEL.
CODE ANN. tit. 13, § 1505 (1981); HAW. REV. STAT. § 580-41 (1976); ILL. ANN. STAT. ch. 40, para. 102
(Smith-Hurd 1980); IOWA CODE ANN. § 598.5 (West 1981); MONT. CODE ANN. § 40-4-104 (1987). See
generally UNIFORM MARRIAGE AND DIVORCE ACT § 307 (1982).

married couples living together in this country.⁴⁸ To place the number in some perspective, there were approximately 525,000 unmarried couples living together in 1970, and approximately 1,350,000 couples cohabitating in 1979.⁴⁹ Thus, conduct once considered unacceptable has now become relatively commonplace, since few negative connotations apply to the practice anymore.⁵⁰ In fact, not only are states repealing anti-fornication statutes,⁵¹ but many jurisdictions have even started to award child custody rights to single parents living in various forms of "meretricious" cohabitation.⁵²

As the incidence of nonmarital cohabitation increased, the law began to offer protection to cohabitants against various forms of discriminatory treatment based upon the meretricious relationship. For example, one jurisdiction held that a landlord may not refuse to rent to couples simply because they are unmarried,⁵³ while another ruled that a municipal worker's employment may not be terminated based upon the employee's refusal to disclose information about his living arrangement with his mistress.⁵⁴ In like manner, an application for a mortgage loan under the Equal Credit Opportunity Act may not be denied solely because the applicants are unmarried cohabitants.⁵⁵ Furthermore, nonmarital cohabitation may not be used as a criterion in determining the moral character of an applicant to sit for the bar examination.⁵⁶ Indeed, a few jurisdictions have gone so far as to hold that state statutes which criminalize consensual sodomy or deviate sexual intercourse between persons not married to each other, even of the same sex, are unconstitutional.⁵⁷ Because of the social and legal change in attitude towards meretricious cohabitation,

48 U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, No. 412, HOUSEHOLDS, FAMILIES, MARITAL STATUS, AND LIVING ARRANGEMENTS: MARCH 1986 Advance Report 2, fig. 2. See The Phila. Inquirer, May 13, 1988, at A-3. See also Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 275 n.1; Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1831 n.12 (1987).

49 See Comment, *Extending Consortium Rights to Unmarried Cohabitants*, 129 U. PA. L. REV. 911, 911 n.1 (1981).

50 The practice is favored not only among the young, but among the elderly as well, primarily for pension and social security payment purposes. See Sussman, *The Four F's of Variant Family Forms and Marriage Styles*, 24 FAMILY COORDINATOR 563, 575-76 (1975); Macklin, *Heterosexual Cohabitation Among Unmarried College Students*, 21 FAMILY COORDINATOR 463 (1972); Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 686 (1976). One recent newspaper article even reported that the "happiness quotient" for the unmarried as compared to that for married couples has risen substantially. N.Y. Times, June 15, 1988, at C-1. However, the practice is still not generally accepted when it involves two partners of the same sex. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (state statute criminalizing consensual sodomy held constitutional as applied to homosexuals).

51 See, e.g., FLA. STAT. § 798.03 (1892) (anti-fornication) (repealed 1983).

52 See, e.g., *S. v. J.*, 81 Misc. 2d 828, 830, 367 N.Y.S.2d 405, 407-08 (Sup. Ct. 1975). Of course, as early as 1968, the United States Supreme Court held that Aid to Families With Dependent Children (AFDC) payments could not be denied to the children of mothers who were cohabiting with able-bodied men. See *King v. Smith*, 392 U.S. 309 (1968).

53 *Hess v. Fair Employment & Housing Comm'n*, 138 Cal. App. 3d 232, 187 Cal. Rptr. 712 (1982).

54 *Shuman v. City of Phila.*, 470 F. Supp. 449 (E.D. Pa. 1979).

55 See *Markham v. Colonial Mortgage Serv. Co., Assocs.*, 605 F.2d 566 (D.C. Cir. 1979).

56 See *Cord v. Gibb*, 219 Va. 1019, 254 S.E.2d 71 (1979).

57 *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980). In light of *Bowers v.*

many commentators are beginning to advocate new forms of marriage in order to encompass the different types of emotional commitment possible in nonmarital living arrangements.⁵⁸

Nowhere is the trend in favor of a more expansive outlook on meretricious living arrangements more pronounced than in the law's relatively recent recognition of the property rights of unmarried cohabitants. For years, most courts refused to enforce agreements concerning the division of property between unmarried cohabitants upon the termination of the relationship (by death or otherwise) because such promises were deemed to be based on immoral or illicit consideration.⁵⁹ Some courts, however, did recognize that meretricious partners could enter into valid express contracts regulating their property rights, as long as there was some consideration independent of the illicit relationship itself.⁶⁰ These courts often purposely severed that portion of the agreement involving sex from the remainder of the contract in order to enforce the bargain. Gradually, other courts began to enforce understandings between meretricious couples relating to a division of their property based upon pooling, partnership, or joint adventure agreements, or whenever there were circumstances adequate to establish resulting or constructive trusts.⁶¹ Later on, some courts also began to recognize property rights between cohabitants based upon implied agreements.⁶²

This progression eventually culminated in the landmark decision of *Marvin v. Marvin*,⁶³ in which the Supreme Court of California, in dictum, concluded that courts should enforce not only express contracts between unmarried cohabitants, but also should employ the doctrines of implied contract, quantum meruit, and other equitable remedies to achieve a fair division and distribution of cohabitants' property,⁶⁴ based on the pre-

Hardwick, 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986), these decisions have questionable validity. Even so, they illustrate a change in perception towards one type of meretricious relationship.

58 In this regard, see Clark, *The New Marriage*, 12 WILLIAMETTE L. REV. 441 (1976); Glendon, *Modern Marriage Law and its Underlying Assumptions: The New Marriage and the New Property*, 13 FAM. L.Q. 441 (1980); Reppy, *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677 (1984).

59 This line of reasoning was sometimes called the meretricious spouse rule. See, e.g., *Stevens v. Anderson*, 75 Ariz. 331, 256 P.2d 712 (1953); *Flanagan v. Capital Nat'l Bank*, 213 Cal. 664, 3 P.2d 307 (1931); *Baker v. Baker*, 222 Minn. 169, 23 N.W.2d 582 (1946); *Gauthier v. Laing*, 96 N.H. 80, 70 A.2d 207 (1950); *In re Sloan's Estate*, 50 Wash. 86, 96 P. 684 (1908); *Smith v. Smith*, 255 Wis. 96, 38 N.W.2d 12 (1949). See also RESTATEMENT (FIRST) OF CONTRACTS § 589 (1932).

60 See, e.g., *Hill v. Westbrook's Estate*, 39 Cal. 2d 458, 460, 247 P.2d 19, 20 (1952); *Lovinger v. Anglo Cal. Nat'l Bank of San Francisco*, 243 P.2d 561 (Cal. App. 1952); *Trutalli v. Meraviglia*, 215 Cal. 698, 12 P.2d 430 (1932) (en banc); *Baxter v. Wilburn*, 172 Md. 160, 162-63, 190 A. 773, 774 (1937); *Tyranski v. Piggins*, 44 Mich. App. 570, 205 N.W.2d 595 (1973). See RESTATEMENT (FIRST) OF CONTRACTS § 597 (1932); 6 A. CORBIN, CONTRACTS § 1476, at 622 (1962).

61 See, e.g., *Vallera v. Vallera*, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943); *Garcia v. Venegas*, 106 Cal. App. 2d 364, 235 P.2d 84 (1951); *Williams v. Payne*, 515 S.W.2d 618, 620 (Ky. 1974); *Creasman v. Boyle*, 31 Wash. 2d 345, 196 P.2d 835 (1948), *overruled*, *In re Marriage of Lindsey*, 101 Wash. 2d 299, 678 P.2d 328 (1984) (attempting to eliminate the unpredictable nature of the rule in *Creasman* while making a just and equitable disposition of property to a meretricious partner). See also Comment, *Illicit Cohabitation: The Impact of the Vallera and Keene Cases on the Rights of the Meretricious Spouse*, 6 U.C. DAVIS L. REV. 354 (1973).

62 See, e.g., *In re Estate of Thornton*, 81 Wash. 2d 72, 499 P.2d 864 (1972).

63 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

64 *Id.* at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32.

sumption that the parties intend to deal fairly with each other.⁶⁵ Of particular importance was the court's attitude towards the denial of judicial relief for cohabitants based only upon moral grounds:

[W]e believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the so-called meretricious relationship. . . . [T]he nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice.⁶⁶

Currently, many jurisdictions follow the *Marvin* rationale, or parts thereof, and recognize claims of cohabitants based upon express contracts,⁶⁷ implied contracts,⁶⁸ or other equitable remedies.⁶⁹ In addition, one jurisdiction attempts to regulate agreements between unmarried cohabitants by statute,⁷⁰ while another deems cohabitation after three years a legal marriage.⁷¹ Finally, many commentators have attempted to

65 *Id.*, 557 P.2d at 122, 134 Cal. Rptr. at 831-32. As the *Marvin* court stated:

We conclude that the judicial barriers [to] . . . the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed [E]xpress agreements will be enforced unless they rest on an unlawful meretricious consideration. We add that in the absence of an express agreement, the courts may look to a variety of other remedies in order to protect the parties' lawful expectations.

Id., 557 P.2d at 122, 134 Cal. Rptr. at 831. See also Kay & Amyx, *Marvin v. Marvin, Preserving the Options*, 65 CAL. L. REV. 937 (1977); Comment, *Property Rights Upon Termination of Unmarried Cohabitation*, 90 HARV. L. REV. 1708 (1977).

66 18 Cal. 3d at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831. It is important to note that *Marvin* was not the first case to embody the change in the law's attitude towards the enforcement of agreements between meretricious couples. See, e.g., *In re Marriage of Carey*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973); *Omer v. Omer*, 11 Wash. App. 386, 523 P.2d 957 (1974); *Latham v. Latham*, 274 Or. 421, 547 P.2d 144 (1975); *Latham v. Hennessey*, 87 Wash. 2d 550, 553-55, 554 P.2d 1057, 1059-60 (1976). See also Olson, *In re Marriage of Carey: The End of the Putative-Meretricious Spouse Distinction in California*, 12 SAN DIEGO L. REV. 436 (1975). Nevertheless, the *Marvin* decision marked a turning point in society's recognition and acceptance of the legal rights of unmarried cohabitants, in part because of the extensive press coverage surrounding the case at the time of the decision. The case has continued to inspire numerous commentaries over the years. For further discussion, see Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47 (1978); Hunter, *An Essay on Contract and Status: Race, Marriage, and the Meretricious Spouse*, 64 VA. L. REV. 1039 (1978); Comment, *The Enforcement of Cohabitation Agreements: Theories of Recovery for the Meretricious Spouse*, 61 NEB. L. REV. 138 (1982); Comment, *Marvin v. Marvin: Five Years Later*, 65 MARQ. L. REV. 389 (1982).

67 See *Poe v. Levy*, 411 So. 2d 253, 256 (Fla. Dist. Ct. App. 1982); *Donovan v. Scuderi*, 51 Md. App. 217, 443 A.2d 121 (1982); *Kinkenon v. Hue*, 207 Neb. 698, 702, 301 N.W.2d 77, 81 (1981); *Kozlowski v. Kozlowski*, 80 N.J. 378, 384, 403 A.2d 902, 908 (1979); *Morone v. Morone*, 50 N.Y.2d 481, 488, 407 N.E.2d 438, 441, 429 N.Y.S.2d 592, 595 (1980); *McCall v. Frampton*, 81 A.D.2d 607, 608, 438 N.Y.S.2d 11, 13 (1981); *Knauer v. Knauer*, 323 Pa. Super. 206, 470 A.2d 553 (1983).

68 See *Carroll v. Lee*, 148 Ariz. 10, 14, 712 P.2d 923, 927 (1986); *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984).

69 See *Mason v. Rostad*, 476 A.2d 662, 666 (D.C. App. 1984); *In re Eriksen*, 337 N.W.2d 671, 673-74 (Minn. 1983); *Carlson v. Olson*, 256 N.W.2d 249, 255 (Minn. 1977); *McCullon v. McCullon*, 96 Misc. 2d 962, 969-71, 410 N.Y.S.2d 226, 231-32 (1978); *Beal v. Beal*, 282 Or. 115, 577 P.2d 507 (1978) (en banc); *Watts v. Watts*, 137 Wis. 2d 506, 529, 534, 405 N.W.2d 303, 313, 315 (1987); *In re Estate of Steffes*, 95 Wis. 2d 490, 498, 290 N.W.2d 697, 705 (1980).

70 See MINN. STAT. ANN. § 513.075 (West Supp. 1988).

71 See N.H. REV. STAT. ANN. § 457:39 (1983).

Not all jurisdictions have followed the *Marvin* trend. In fact, a few states refuse to recognize any legal claims based upon cohabitation without marriage. See, e.g., *Rehak v. Mathis*, 239 Ga. 541, 542,

formulate comprehensive new legal rights based upon the practice of cohabitation without marriage.⁷²

In light of the many changes which have taken place in how domestic relations law treats meretricious relationships, and especially nonmarital cohabitation, which is perhaps the archetypal meretricious relationship within the context of this article, it no longer is fitting to view a meretricious relationship as inherently relevant, as a matter of course, in determining whether undue influence has been exercised in the making of a testamentary gift to the surviving partner of the relationship. Inasmuch as meretricious relationships have achieved a more accepted and legitimate status in the eyes of the law, and that various legal rights have begun to attach to such unions, courts have less and less justification for deeming the influence which results from the relationships as necessarily undue. Clearly, the traditional rationale which most courts follow in such situations is now outdated, since the "immorality" of the testator is no longer an appropriate consideration in such cases. In addition, the recognition of existing property rights during life militates against a denial of such rights upon death. Interestingly enough, the change in attitude towards most sexual relationships between consenting adults allows the element of coercion more easily to play its rightful role in determining whether undue influence is involved in a testamentary gift, without regard to the morality of the previous relationship between the testator and the beneficiary. This, in turn, permits the freedom of testation to be the focus whenever undue influence is alleged in the making of a testamentary gift.

IV. Reasoning by Analogy

The viewpoint that a testamentary gift which results from a meretricious relationship between the testator and the beneficiary should not be viewed exclusively as evidence of undue influence also receives support when analogized to established principles and recent developments in the areas of life insurance, entitlement, and tort law. In these fields, certain kinds of property claims are generally permitted regardless of the relationships involved, while an increasing number of legal claims, traditionally based upon spousal status, are beginning to succeed when based upon nonmarital, meretricious relations as well. In other words, the ability to sue to protect a property or spousal interest in the event of injury or death to the other party is increasingly being recognized for meretricious partners or nonmarital cohabitants. The growing recognition of

238 S.E.2d 81, 82 (1977) (cohabitation constitutes immoral consideration preventing cohabitant from recovery); *Hewitt v. Hewitt*, 77 Ill. 2d 49, 66, 394 N.E.2d 1204, 1211 (1979) (public policy prevents enforcement of property rights to knowingly unmarried cohabitants); *Estate of Alexander v. Alexander*, 445 So. 2d 836 (Miss. 1984) (woman's services not recognized for purposes of property division between unmarried cohabitants). Other courts still pick and choose which claims to allow, based upon their own notions of morality. See, e.g., *Jones v. Daly*, 122 Cal. App. 3d 500, 176 Cal. Rptr. 130 (1981); *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. Ct. App. 1983), cert. denied, 467 U.S. 1206 (1984).

72 See, e.g., Folberg & Buren, *Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families*, 12 WILLIAMETTE L. REV. 453 (1976). See also Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163 (1985).

these types of claims indicates that it now makes little sense to infer undue influence as a matter of course whenever meretricious relationships result in testamentary gifts to the surviving partner.

A. *Life Insurance Claims*

Under ordinary life insurance policies most courts hold that the existence of a meretricious relationship between the insured and the beneficiary is not a relevant consideration in determining the rights of the parties under the insurance contract. Thus, an insured may name his mistress or cohabitant as beneficiary, and the designated individual may recover the insurance proceeds upon the insured's death, regardless of the prior relationship between the two.⁷³ Even a false statement as to the relationship which exists between an insured and his beneficiary does not necessarily vitiate the policy, and preclude recovery.⁷⁴ In addition, a majority of courts rule that, within the context of life insurance contracts, meretricious relationships between the insured and the beneficiary are not per se confidential, and therefore no presumption of undue influence arises in such cases.⁷⁵ Then, too, under certain circumstances, common law spouses are generally permitted to recover the proceeds of life insurance policies, even though the insured partner has designated the other as his legal spouse on the policy.⁷⁶ From a functional viewpoint, there seems to be little difference between common law marriage and sustained nonmarital cohabitation.⁷⁷ Furthermore, many jurisdictions, which ostensibly do not recognize common law marriage, have recently allowed *Marvin*-type property claims to prevail.⁷⁸ It is also interesting to note that the National Service Life Insurance Act, which originally permitted a veteran to designate only a spouse or immediate blood relative as a beneficiary under a service policy, was later amended to allow the insured to name anyone at all as a beneficiary, including a "sweet-

73 See *Quinton v. Millican*, 196 Ga. 175, 179, 26 S.E.2d 435, 437 (1943); *Cook v. Pullman Co.*, 321 Ill. App. 302, 53 N.E.2d 55 (1944); *Succession of Bankston*, 166 So. 900, 901 (La. Ct. App. 1936); *Shepard v. Espy*, 142 N.E.2d 238, 241-42 (Ohio Ct. App. 1955); *Moore v. Travelers Ins. Co.*, 74 Ohio App. 420, 422, 59 N.E.2d 225, 226 (1944). See also *Rakestraw v. City of Cincinnati*, 69 Ohio App. 504, 44 N.E.2d 278 (1942).

74 See *Jackson v. Continental Casualty Co.*, 412 So. 2d 1364 (La. 1982); *Gibson v. Travelers Ins. Co.*, 183 Misc. 678, 50 N.Y.S.2d 519 (1944); *Hendricks v. Prudential Ins. Co. of Am.*, 149 Pa. Super. 350, 352, 27 A.2d 261, 261 (1942). See also *Matthews v. Stroud*, 239 Ala. 687, 196 So. 885 (1940). But see *Strachan v. Prudential Ins. Co. of Am.*, 321 Mass. 507, 73 N.E.2d 840 (1947) (earlier rule).

75 See *Tracy v. Prudential Ins. Co. of Am.*, 34 Del. Ch. 207, 220, 101 A.2d 321, 328 (1953); *Smith v. Hinton*, 349 So. 2d 510, 512 (Miss. 1977). See also *Goodale v. Wilson*, 134 Me. 358, 186 A. 876 (1936). But see *Benner v. Pederson*, 143 So. 2d 722 (Fla. Dist. Ct. App. 1962) (minority rule).

76 See *Redlinger v. Youle*, 321 P.2d 509, 157 Cal. App. 2d 596 (1958); *Jackson v. Smith*, 703 S.W.2d 791 (Tex. App. 1985); *Proctor v. Insurance Co. of N. Am.*, 714 P.2d 1156 (Utah 1986). See also *Jackson v. Continental Casualty Co.*, 412 So. 2d 1364 (La. 1982).

77 See Weyrauch, *Informal and Formal Marriage—An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88, 93, 102 (1960). A common law marriage customarily requires that the parties consummate an agreement to marry, followed by a period of sustained cohabitation. Of course, it is virtually impossible to prove the agreement to marry.

78 See *supra* notes 67-69; F. KUCHLER, *LAW OF ENGAGEMENT AND MARRIAGE* 3 (2d ed. 1978); Weyrauch, *supra* note 77, at 104-08. See also Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1831 n.11, 1846 (1987). Putative spouses have also been allowed to recover life insurance proceeds. See *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975); *infra* note 82.

heart."⁷⁹ Since one can designate a meretricious partner as a beneficiary under an ordinary life insurance policy without any inference of undue influence, it is difficult to justify why such an inference should operate when making a gift by will. After all, both an insured and a testator are equally at risk of undue influence. Moreover, the living may well be considered in greater need of protection from their own actions than the dead.⁸⁰

B. *Entitlement Claims*

Although applications for spouse's death benefits under the Social Security Act normally must be based on a strict status relationship of legal spouse, as determined by state intestacy statutes,⁸¹ putative, good faith spouses⁸² may also recover such benefits under certain circumstances.⁸³ Significantly, at least one jurisdiction has virtually abolished the distinction between putative and meretricious spouses, at least for purposes of intestate and testate succession, where the meretricious relationship is sustained and familial in nature.⁸⁴ In addition, under the law of those states which recognize common law marriage, common law spouses are frequently permitted to recover survivor's benefits as well.⁸⁵ More importantly, under the recently enacted Supplemental Security Income Title of the Social Security Act, meretricious relationships, under certain circumstances, appear to qualify as spousal relationships in determining public assistance payments to aged, blind, and disabled adults.⁸⁶ This blurring of distinction between spousal and meretricious relationships may be a portent of the future in deciding the property rights of a surviving meretricious spouse under other provisions of the Act.

79 See National Serv. Life Ins. Act of 1940, 38 U.S.C. §§ 716, 717 (1982 & Supp. IV 1986). Compare *United States v. Hoffman*, 129 F. Supp. 580 (D.N.J. 1955); *Batts v. United States*, 120 F. Supp. 26 (E.D.N.C. 1954); *Morton v. United States*, 92 F. Supp. 75 (W.D. Pa. 1950), with *Morris v. United States*, 217 F. Supp. 220 (N.D. Tex. 1963). See also *Rombauer, Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 WASH. L. REV. 227, 231-56 (1977).

80 On the other hand, one can argue that the doctrine of undue influence serves as a protective device for the testator, since one needs less mental capacity to execute a will than a contract.

81 See 42 U.S.C. § 416(h)(1)(A) (1982) (spousal status determined by reference to state law regarding devolution of intestate personal property). See also *Califano v. Boles*, 443 U.S. 282 (1979) (restriction of "mother's insurance benefits" to widows and divorced wives of wage earners not a denial of equal protection). Despite *Califano*, several suits have been brought by meretricious spouses to recover mother's insurance benefits. Thus far, none has been successful. See, e.g., *Young v. Secretary of Health & Human Servs.*, 787 F.2d 1064 (6th Cir. 1986); *Chambers v. Harris*, 687 F.2d 332 (10th Cir. 1982).

82 Several states have adopted "putative marriage" statutes, which confer the rights of a legal spouse upon those who in good faith believe their marriage to be valid, even though legally void. See, e.g., COLO. REV. STAT. § 14-2-111 (1987); ILL. ANN. STAT. ch. 40, para. 305 (Smith-Hurd 1980); LA. CIV. CODE ANN. art. 117 (West 1952); MINN. STAT. ANN. § 518.055 (West Supp. 1988); MONT. CODE ANN. § 40-1-404 (1987). See also UNIFORM MARRIAGE AND DIVORCE ACT § 209 (1987).

83 See 42 U.S.C. § 416(h)(1)(B) (1982); *Aubrey v. Folsom*, 151 F. Supp. 836 (N.D. Cal. 1957); *Kimball v. Folsom*, 150 F. Supp. 482 (W.D. La. 1957).

84 See *In re Estate of Atherly*, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975).

85 See, e.g., *Renshaw v. Heckler*, 787 F.2d 50 (2d Cir. 1986); *Orr v. Bowen*, 648 F. Supp. 1510 (D. Nev. 1986). See *supra* text accompanying note 77. See also *Smith v. Heckler*, 707 F.2d 1284 (11th Cir. 1983).

86 See 42 U.S.C. § 1382c(d)(2) (1983).

C. Tort Claims

In the area of tort law, meretricious couples are beginning to prevail when bringing suits to protect a spousal interest in the event of injury or death to the other partner due to the negligence of a third party. Certain trends are emerging which indicate that the rights of spouses are gradually being extended to nonmarital couples, particularly in actions for loss of consortium, negligent infliction of emotional distress, worker's compensation, and wrongful death.

With respect to loss of consortium claims, courts have gradually expanded the boundaries of the tort action to include not only the husband as claimant,⁸⁷ but the wife as well.⁸⁸ In addition, some courts extend the right to sue for loss of consortium to parents for the loss of their child's society and companionship.⁸⁹ More to the point, two courts recently granted loss of consortium rights to unmarried cohabitants as an incident of their cohabitational status.⁹⁰ Both courts reasoned that a member of a nonmarital relationship can suffer identical damage to that suffered by a spouse whose mate is injured.⁹¹ Two other courts also recognized the legitimacy of claims by cohabitants for loss of consortium.⁹² Not surprisingly, common law spouses fairly routinely are permitted to sue for loss of consortium.⁹³ Finally, several commentators argue that the time has come to recognize consortium rights for unmarried cohabitants.⁹⁴

Some courts, however, refused to follow a rule granting recovery to meretricious partners in the loss of consortium area, in part because of the difficulties of proof involved in determining the stability and durability of the relationships involved.⁹⁵ However, the question of whether a

87 See Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923). A discussion of the historical underpinnings for a husband's right to recover for loss of consortium can be found in Neuberg v. Bobowicz, 401 Pa. 146, 162 A.2d 662 (1960).

88 See *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir.), cert. denied, 340 U.S. 852 (1950), overruled, *Smither and Co., Inc. v. Coles*, 242 F.2d 220 (D.C. Cir.), cert. denied, 354 U.S. 914 (1957) (*Smither* overruled *Hitaffer* as applied to other circumstances); Comment, *Extending Consortium Rights to Unmarried Cohabitants*, 129 U. PA. L. REV. 911, 917 nn.37-38 (1981).

89 See, e.g., *Hair v. County of Monterey*, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975) (dictum); *Shockley v. Prier*, 66 Wis. 2d 394, 225 N.W.2d 495 (1975). But see *Shattuck v. Gulliver*, 40 Conn. Supp. 95, 481 A.2d 1110 (Conn. Super. Ct. 1984); *Butler v. Chrestman*, 264 So. 2d 812 (Miss. 1972); *Beyer v. Murray*, 33 A.D.2d 246, 306 N.Y.S.2d 619 (1970).

90 See *Bullock v. United States*, 487 F. Supp. 1078 (D.N.J. 1980); *Butcher v. Superior Court*, 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (1983). Although *Butcher* has recently been overruled by *Elden v. Sheldon*, 758 P.2d 582, 250 Cal. Rptr. 254 (1988) (en banc), a strong dissent maintained that the majority opinion was short-sighted and not in step with the realities of modern living arrangements. *Id.* at 590, 250 Cal. Rptr. 262 (Broussard, J., dissenting).

91 The *Butcher* court also required that the nonmarital relationship be both stable and significant in order to qualify as a parallel to the marital relationship. *Butcher*, 139 Cal. App. 3d at 70, 188 Cal. Rptr. at 512.

92 See *Norman v. General Motors Corp.*, 628 F. Supp. 702 (D. Nev. 1986); *Grant v. Avis Rent A Car Sys., Inc.*, 158 Cal. App. 3d 813, 204 Cal. Rptr. 869 (1984).

93 See *Mattison v. Kirk*, 497 So. 2d 120 (Ala. 1986); *Etienne v. DKM Enter., Inc.*, 136 Cal. App. 3d 487, 186 Cal. Rptr. 321 (1982); *supra* text accompanying note 77. See also *Laws v. Griep*, 332 N.W.2d 339 (Iowa 1983).

94 See, e.g., Meade, *Consortium Rights of the Unmarried: Time for a Reappraisal*, 15 FAM. L.Q. 223 (1981); Comment, *supra* note 88.

95 See *Ledger v. Tippitt*, 164 Cal. App. 3d 625, 637-38, 210 Cal. Rptr. 814, 820 (1985) (refusing to follow *Butcher*); *Lewis v. Hughes Helicopter, Inc.*, 193 Cal. App. 3d 569, 220 Cal. Rptr. 615 (1986) (refusing to follow *Butcher*); *Hendrix v. General Motors Corp.*, 146 Cal. App. 3d 296, 193 Cal. Rptr. 922 (1983) (refusing to follow *Butcher*); See also *Sykes v. Zook Enter., Inc.*, 215 N.J. Super. 461, 521

meretricious relationship is stable and durable could be a question of fact for the jury to decide. Several courts also declined to adopt such a rule because of an official public policy favoring marriage over nonmarital cohabitation.⁹⁶ In light of the increasing number of nonmarital relationships in our society, however, public policy may eventually have to yield to practical reality.⁹⁷

There has been a similar, and perhaps more compelling, progression with regard to negligent infliction of emotional distress claims. In the late sixties and early seventies, several courts began to hold that one need not be within a "zone of danger"⁹⁸ in order to sue for emotional distress generated by witnessing the negligent infliction of a tortious injury on an immediate family member, including a spouse.⁹⁹ Later, a few courts went somewhat further, and suggested that the absence of a blood relationship between the victim and the plaintiff did not necessarily bar recovery.¹⁰⁰ More significantly, two courts recently allowed unmarried cohabitants to state a cause of action for negligent infliction of emotional distress based upon injury to the other partner, as long as the meretricious relationship is a sustained or familial one.¹⁰¹

A.2d 1380 (Law Div. 1987); *Leonardis v. Morton Chem. Co.*, 184 N.J. Super. 10, 445 A.2d 45 (App. Div. 1982) (refusing to follow *Bullock*).

96 See *Weaver v. Searle*, 558 F. Supp. 720, 723 (N.D. Ala. 1983); *Gonzales v. Hudson*, 200 Cal. App. 3d 45, 245 Cal. Rptr. 753, *superseded*, 755 P.2d 355, 248 Cal. Rptr. 171 (Cal. 1988) (in bank); *Elden v. Sheldon*, 164 Cal. App. 3d 745, 210 Cal. Rptr. 755 (1985), *vacated*, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988); *Tong v. Jolson*, 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1977); *Gillespie-Linton v. Miles*, 58 Md. App. 484, 473 A.2d 947 (1984); *Haas v. Lewis*, 8 Ohio App. 3d 136, 456 N.E.2d 512 (1986). See also *Kiesel v. Peter Kiewit & Sons Co.*, 638 F. Supp. 1251 (D. Haw. 1986).

97 It is interesting to note that quite a few courts have permitted married partners to recover for loss of consortium even though they were not married at the time of the injury. See *Sutherland v. Auch Inter-Borough Transit Co.*, 366 F. Supp. 127 (E.D. Pa. 1973); *Stahl v. Nugent*, 212 N.J. Super. 340, 514 A.2d 1367 (Law Div. 1986); *Orga v. Pittsburgh Rys.*, 155 Pa. Super. 82, 85, 38 A.2d 391, 392 (1944). But see *Curry v. Caterpillar Tractor Co.*, 577 F. Supp. 991 (E.D. Pa. 1984); *Chiesa v. Rowe*, 486 F. Supp. 236 (W.D. Mich. 1980); *Wagner v. International Harvester Co.*, 455 F. Supp. 168 (D. Minn. 1978); *Sawyer v. Bailey*, 413 A.2d 165 (Me. 1980); *Childers v. Shannon*, 183 N.J. Super. 591, 444 A.2d 1141 (Law Div. 1982); *Rademacher v. Torbensen*, 257 A.D. 91, 13 N.Y.S.2d 124 (1939).

98 See RESTATEMENT (SECOND) OF TORTS § 313 (1965).

99 See *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (en banc); *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981); *Dziokonski v. Babineau*, 375 Mass. 555, 380 N.E.2d 1295 (1978); *Toms v. McConnell*, 45 Mich. App. 647, 207 N.W.2d 140 (1973); *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980); *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1970); *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975). See also *Walker v. Clark Equip. Co.*, 320 N.W.2d 561 (Iowa 1982). But see *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); *Guilmette v. Alexander*, 128 Vt. 116, 259 A.2d 12 (1969).

100 See *Keck v. Jackson*, 122 Ariz. 114, 116, 593 P.2d 668, 670, *vacated*, 122 Ariz. 114, 593 P.2d 668 (1979); *Mobaldi v. Board of Regents*, 55 Cal. App. 3d 573, 582-83, 127 Cal. Rptr. 720, 726-27 (1976); *Leong v. Takasaki*, 55 Haw. 398, 410, 520 P.2d 758, 766 (1974).

101 See *Garcia v. Superior Court*, 169 Cal. App. 3d 397, 215 Cal. Rptr. 189, 193 (1985); *Ledger v. Tippitt*, 164 Cal. App. 3d 625, 646, 210 Cal. Rptr. 814 (1985) *overruled*, *Elden v. Sheldon*, 758 P.2d 582, 250 Cal. Rptr. 254 (Cal. 1988) (in bank). Although both cases were recently overruled, *Garcia* implicitly, *Ledger* explicitly, the three decisions indicate that a heated debate is taking place as to whether courts should grant relief for such claims. See also *Binns v. Fredendall*, 32 Ohio St. 3d 244, 513 N.E.2d 278 (1987) (girlfriend directly involved in accident permitted to recover for mental distress caused by witnessing death of her boyfriend). But see *Drew v. Drake*, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980); *Ferretti v. Weber*, 513 So. 2d 1333 (Fla. Dist. Ct. App. 1987). See also *Roman v. Carroll*, 127 Ariz. 398, 621 P.2d 307 (1980) (no recovery for witnessing death of dog).

In the worker's compensation area, several state statutes determine eligibility for death benefits by whether the surviving partner is "dependent" on the deceased employee for support at the time of his death.¹⁰² Under such statutes, many courts hold that actual dependency can include that which arises from meretricious cohabitation.¹⁰³ Moreover, in some states, putative spouses may recover death benefits,¹⁰⁴ as may common law spouses.¹⁰⁵ Furthermore, several commentators argue that worker's compensation death benefits should be available to all survivors of the deceased employee who qualify as actual dependents, regardless of their prior relationship with the deceased.¹⁰⁶

Finally, although most wrongful death statutes usually base recovery by a claimant on the claimant's status as an intestate heir or blood relative of the decedent,¹⁰⁷ which, of course, would exclude a meretricious spouse,¹⁰⁸ one jurisdiction determines eligibility for recovery on the basis of dependency.¹⁰⁹ This appears to include a nonmarital partner.¹¹⁰ In addition, putative spouses may recover for wrongful death in some jurisdictions,¹¹¹ while a few others appear to recognize a common law

102 See, e.g., KAN. STAT. ANN. § 44-510b (Supp. 1987); MD. ANN. CODE art. 101, § 36 (Supp. 1988); S.C. CODE ANN. § 42-9-290 (Law. Co-op. 1985); VA. CODE ANN. § 65.1-65 (1987).

103 See Department of Indus. Relations, Div. of Indus. Accidents v. Workers' Compensation Appeals Bd., 94 Cal. App. 3d 72, 156 Cal. Rptr. 183 (1979); Henderson v. Travelers Ins. Co., 354 So. 2d 1031 (La. 1978); Kendall v. Housing Auth., 196 Md. 370, 76 A.2d 767 (1950); West v. Barton-Malow Co., 394 Mich. 334, 230 N.W.2d 545, reh'g denied, 395 Mich. 902, 232 N.W.2d 672 (1975).

On the other hand, many workers' compensation statutes restrict claimants to members of a predetermined class, such as legal spouses or blood relatives. See, e.g., IND. CODE ANN. § 22-3-3-20 (Burns 1986); N.M. STAT. ANN. § 52-1-46 (1978); OHIO REV. CODE ANN. § 4123.59 (Anderson 1980); VT. STAT. ANN. tit. 21, § 632 (1987). Courts tend to construe these types of provisions strictly. See *In re Reichert*, 95 Idaho 647, 516 P.2d 704 (1973); Norrington v. Charles E. Cannell Co., 383 S.W.2d 137 (Ky. 1964); Lavoie v. International Paper Co., 403 A.2d 1186 (Me. 1979); Jones v. D. Canale & Co., 652 S.W.2d 336 (Tenn. 1983). See also Powell v. Rogers, 496 F.2d 1248 (9th Cir.), cert. denied, 419 U.S. 1032 (1974).

104 See Williams v. Fireman's Fund Ins. Co., 670 P.2d 453, 455 (Colo. Ct. App. 1983); Parkinson v. J. & S. Tool Co., 64 N.J. 159, 313 A.2d 609 (1974); CAL. LABOR CODE § 3503 (West 1971). See also Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1, 45-48 (1985). See *supra* note 82.

105 See Biggie v. Northern Distrib. Co., 11 A.D.2d 591, 200 N.Y.S.2d 763 (1960); Bowlin v. State Accident Ins. Fund Corp., 81 Or. App. 527, 726 P.2d 1186 (1986); Rager v. Johnstown Traction Co., 184 Pa. Super. 474, 134 A.2d 918 (1957); OR. REV. STAT. § 656.226 (1985). See *supra* text accompanying note 77.

106 See, e.g., Davis, *Dependency in Workmen's Compensation: Letting the Expectations and Conduct of Affected Parties Play a More Significant Role*, 23 VAND. L. REV. 23 (1969). See generally 2 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 63.40 (1987).

107 See, e.g., IDAHO CODE § 5-313 (Supp. 1987); MASS. GEN. LAWS ANN. ch. 229, § 1 (West 1985); MO. ANN. STAT. § 537.080 (Vernon 1988); N.J. STAT. ANN. § 2A:31-4 (West 1987); WASH. REV. CODE ANN. § 4.20.020 (1988). See also Death on the High Seas by Wrongful Death Act, 46 U.S.C. § 761 (1982).

108 See Aspinall v. McDonnell Douglas Corp., 625 F.2d 325 (9th Cir. 1980); Matuz v. Geradin Corp., 192 Cal. App. 3d 1596, 228 Cal. Rptr. 442 (1986); Ledger v. Tippitt, 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (1985); Garcia v. Douglas Aircraft Co., 133 Cal. App. 3d 890, 184 Cal. Rptr. 390 (1982); Harrod v. Pacific Southwest Airlines, Inc., 118 Cal. App. 3d 155, 173 Cal. Rptr. 68 (1981); Sykes v. Propane Power Corp., 224 N.J. Super. 686, 541 A.2d 271 (App. Div. 1988).

109 See HAW. REV. STAT. § 663-3 (1976).

110 Interestingly, in this context, most jurisdictions hold that the right to bring suit for wrongful death accrues at the time of the victim's death, even though the deceased was not married at the time of the injury. See, e.g., Lovett v. Garvin, 232 Ga. 747, 208 S.E.2d 838 (1974); Radley v. Le Ray Paper Co., 214 N.Y. 32, 108 N.E. 86, reh'g denied, 214 N.Y. 688, 108 N.E. 1106 (1915).

111 See Kunakoff v. Woods, 166 Cal. App. 59, 332 P.2d 773 (1958); King v. Cancienne, 316 So. 2d 366 (La. 1975); CAL. CIV. PROC. CODE § 377 (West Supp. 1985); ILL. ANN. STAT. ch. 70, para. 2 (Smith-Hurd 1977); *supra* note 82.

spouse's right of recovery as well.¹¹² However, because wrongful death is a creature of statute, and because legislatures are slow to institute reform in the tort area,¹¹³ it is not surprising that wrongful death actions are generally limited to surviving spouses or blood relatives. Then, too, wrongful death actions, unlike those of worker's compensation, are not based upon the decedent's original property rights, but on the survivor's right to compensation for the decedent's death. This may also explain, in part, why many legislatures treat the two types of actions differently. Of course, in light of *Marvin*, an eventual expansion of the permissible class of claimants for wrongful death seems quite possible, perhaps using a pure dependency test.¹¹⁴

V. A Contemporary Approach to Testamentary Gifts Resulting From Meretricious Relationships

Thus, the traditional view that the existence of a meretricious relationship between a testator and a beneficiary is, at the very least, a fact to be considered in determining undue influence conflicts with contemporary notions of morality, as well as with established norms and recent developments in other areas of the law. Indeed, the inherent premise of the traditional view is no longer viable, since society's conception of morality and the rights of meretricious couples has expanded so radically over the past few years. The customary view is also at odds with common sense and practical reality. After all, it seems perfectly natural that a testator would want to reward someone with whom he has had a sustained, intimate relationship.

The equally viable, if not more realistic, perspective from which to view "meretricious gifts" is that proof of a voluntary, sustained sexual relationship between the testator and the beneficiary should raise a reasonable inference that the beneficiary was a natural object of the testator's bounty. In other words, evidence of a meretricious relationship should point to natural beneficence rather than suspicion or undue influence.

In the past, most courts, when dealing with testamentary gifts to meretricious partners, focused on to whom the gift was made, and the inferences to be drawn therefrom, instead of concentrating primarily on why the gift was made, which is the central question in undue influence cases. Only an approach which views the meretricious partner as a natural object of the testator's bounty resolves the inherent tension between the doctrine of undue influence and the freedom of testation, by allowing courts to focus on the element of coercion in the application of the doctrine. A testator should have the right to dispose of his property to whomever he pleases, as long as he does not ignore his legal obligations. Thus, courts should not interfere with the testator's dispositive scheme

112 See, e.g., *Dupre v. Rochester Ropes, Inc.*, 216 So. 2d 589 (La. Ct. App. 1968); *Chivers v. Couch Motor Lines, Inc.*, 159 So. 2d 544 (La. Ct. App. 1964); *Hastie v. Rodriguez*, 716 S.W.2d 675 (Tex. Ct. App. 1986); *Shelton v. Belknap*, 275 S.W.2d 174 (Tex. Civ. App. 1955); *supra* text accompanying note 77. But see *In re Estate of Gonzalez*, 43 Or. App. 393, 602 P.2d 1132 (1979).

113 See Green, *Protection of the Family Under Tort Law*, 10 HASTINGS L.J. 237, 245-46 (1959).

114 See also *Blakesley*, *supra* note 104, at 45.

unless there is proof that the testator's will has in fact been compromised. After all, undue influence is not a rule of construction which can be used to effectuate certain policies which courts deem advisable.

In terms of effectuating the testator's intent, this viewpoint is undoubtedly the more accurate. Under this approach, a meretricious relationship certainly could result in the exercise of undue influence. However, the relationship, itself, could not be used as a gloss to cover a lack of evidence of any real improper influence on the testator. Instead, true coercion would have to be proved in order to invalidate the will or parts thereof.

Such an approach to meretricious gifts is bolstered by those courts which have held that putative,¹¹⁵ common law,¹¹⁶ and even meretricious spouses¹¹⁷ can inherit under the laws of intestate succession. From a functional viewpoint, a meretricious relationship which is sustained or familial differs very little from a spousal relationship. It thus makes little sense to differentiate between them, except on public policy grounds. Public policy, however, may have to yield to the realities of modern living arrangements.

Some countries already integrate meretricious relationships into their legal institutions. For example, France recognizes the *union libre*, or free union, which is similar to marriage, except that the parties are permitted to initiate and terminate the relationship at will, without legal formalities.¹¹⁸ Sweden, too, acknowledges the social status of *sammanboende*, or living together, as an alternative to marriage.¹¹⁹ In addition, several Latin American countries, such as Cuba,¹²⁰ Venezuela,¹²¹ Bolivia,¹²² and Panama,¹²³ all have legal institutions in place that recognize relationships between nonmarital or meretricious couples and the property rights of the parties arising therefrom. Interestingly, Puerto Rico treats meretricious relationships very liberally as well, and makes meretricious spouses

115 See, e.g., *In re Estate of Vargas*, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974); *Sousa v. Freitas*, 10 Cal. App. 3d 660, 89 Cal. Rptr. 485 (1970); *In re Estate of Ricci*, 201 Cal. App. 2d 146, 19 Cal. Rptr. 739 (1962); *Mazzenga v. Rosso*, 87 Cal. App. 2d 790, 197 P.2d 770 (1948); *In re Succession of Gordon*, 461 So. 2d 357 (La. Ct. App. 1984); *In re Brenchley's Estate*, 96 Wash. 223, 164 P. 913 (1917).

116 See, e.g., *Jennings v. Jennings*, 20 Md. App. 369, 315 A.2d 816 (1974); *Miller v. Miller*, 14 N.J. Super. 501, 82 A.2d 465 (Ch. Div. 1951); *Dibble v. Dibble*, 88 Ohio App. 490, 100 N.E.2d 451 (1950); *In re Stauffer's Estate*, 372 Pa. 537, 94 A.2d 726 (1953); *In re Glasco*, 619 S.W.2d 567 (Tex. Civ. App. 1981); *In re Gallagher's Estate*, 35 Wash. 2d 512, 213 P.2d 621 (1950).

117 See *In re Estate of Atherley*, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975). See also *In re Estate of Black*, 160 Cal. App. 3d 582, 206 Cal. Rptr. 663 (1984).

118 See 2 G. MARTY & P. RAYNAUD, *DROIT CIVIL* 415 (1967). See also Lorio, *Concubinage and its Alternatives: A Proposal for a More Perfect Union*, 26 LOY. L. REV. 1, 22 (1980). Indeed, Planiol even states that, at one point in French law, a concubine was allowed to recover for damages caused by the wrongful death of her lover. See 2 M. PLANIOL, *CIVIL LAW TREATISE* §§ 868, 868A (La. St. L. Inst. trans. 1959). See also M. GLENDON, *STATE, LAW, AND FAMILY* 85 (1977).

119 See M. GLENDON, *STATE, LAW, AND FAMILY* 100 (1977). See also Lorio, *supra* note 118, at 22.

120 See CUBAN CONST. art. 43, para. 6. See also Arraros, *Concubinage in Latin America*, 3 J. FAM. L. 330 (1963); Le Riverend-Brusone, *Anomalous Marriages*, 10 MIAMI L.Q. 481 (1956).

121 See Arraros, *supra* note 120, at 338 (quoting CODE OF VENEZUELA art. 767).

122 See BOLIVIAN CONST. art. 194. See also Arraros, *supra* note 120, at 336.

123 See PANAMANIAN CONST. art. 53. See also Arraros, *supra* note 120, at 336.

specifically eligible for certain legal benefits ordinarily reserved to legal spouses elsewhere.¹²⁴

English law has long recognized that the existence of a meretricious relationship between a testator and a beneficiary should not play a role in determining undue influence. As one probate court explained early on:

[A] young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against those contingencies. A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favour. But that again, shocking as it is, perhaps even worse than the other, will not amount to undue influence.¹²⁵

This line of reasoning was later reflected, to some extent, in the Administration of Estates Act of 1925,¹²⁶ which permitted the Crown to provide for dependents of the deceased, whoever they might be, out of the residue of his estate in the event of escheat.¹²⁷ More recently, under the Inheritance (Provision for Family and Dependents) Act of 1975,¹²⁸ a dependent, de facto spouse may claim a reasonable amount of maintenance out of the deceased partner's estate, even at the expense of his "legal" family.¹²⁹ Since much of our law is derived from English law, the English treatment of nonmarital relationships and meretricious gifts may well represent the position which our law will eventually follow.

VI. Conclusion

Although application of the traditional viewpoint that undue influence is usually a consideration whenever a testator wills property to a meretricious partner can be avoided today through the use of *inter vivos* trusts, pour over wills, ownership of property by joint tenancy, and perhaps even adoption,¹³⁰ not everyone is sophisticated enough to be aware

124 See *Torres v. Roldan*, 67 P.R.R. 342 (1947) (property rights recognized for meretricious spouses upon termination of relationship); Labor-Social Security Act, P.R. LAWS ANN. tit. 29, § 687 (1984) (chauffeur's death benefits); Workmen's Accident Compensation Act, P.R. LAWS ANN. tit. 11, § 3 para. 5 (1977); Automobile Accident Social Protection Act, P.R. LAWS ANN. tit. 9, § 2052(3) (1978); Urban Renewal Act, P.R. R. & REGS. tit. 17, § 22a-9(a)(1) (1971) (public housing benefits).

125 *Wingrove v. Wingrove*, 11 P.D. 81, 82 (1885).

126 15 Geo. 5, ch. 23.

127 *Id.* at § 46.

128 Inheritance (Provision for Family and Dependents), Act 1975, ch. 63.

129 *Id.* at § 1(e); M. GLENDON, STATE, LAW, AND FAMILY 97 (1977); *In re Estate of McC.*, 9 FAM. 26 (1979). See also *Watson v. Lucas*, 3 All E.R. 647, 649-52 (1980). Ontario, Canada, also mandates that a deceased provide adequate support for his common law spouse and "dependents" upon his death. See Succession Law Reform, ONT. REV. STAT. ch. 488, §§ 57, 58 (1980).

130 Proceedings to adopt meretricious partners as legal heirs have not always been successful. See, e.g., *In re Adoption of Robert Paul P.*, 63 N.Y.2d 233, 471 N.E.2d 424, 481 N.Y.S.2d 652 (1984); *Stevens v. Halstead*, 181 A.D. 198, 168 N.Y.S. 142 (1917); *In re Jones*, 122 R.I. 716, 411 A.2d 910 (1980). But see *Green v. Fitzpatrick*, 220 Ky. 590, 295 S.W. 896 (1927); *In re Adult Anonymous II*, 88 A.D.2d 30, 452 N.Y.S.2d 198 (1982); *In re Adoption of Russell*, 170 Pa. Super. 358, 85 A.2d 878 (1952). See also *Bedinger v. Graybill's Ex'r & Trustee*, 302 S.W.2d 594 (Ky. 1957).

of the alternate choices of property disposition, or can afford to hire a lawyer for legal advice. Moreover, the moral climate of the times may inevitably play a role in such cases,¹³¹ no matter how careful courts try to be in downplaying their own prejudices. In any case, contemporary lifestyles necessitate the adoption of a new judicial attitude towards meretricious gifts, in order to incorporate the many changes which the law has already made in dealing with meretricious relationships. Only through such a change in attitude can the freedom of testation become the central focal point whenever one disposes of property by will to a meretricious partner.

131 Perceptions of morality have sometimes figured predominately in cases involving other aspects of mental capacity as well. For example, whether the testator is suffering from an insane delusion at the time he executes his will may depend on the mores of society at the time. See, e.g., *In re Strittmater's Estate*, 140 N.J. Eq. 94, 53 A.2d 205 (1947).